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No. 99-1235

IN THE

Supreme Court of the United States

GREEN TREE FINANCIAL CORP.—ALABAMA, AND GREEN TREE FINANCIAL CORPORATION,
Petitioners,

v.

LARKETTA RANDOLPH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

In their opening brief, Petitioners Green Tree Financial Corp.—Alabama and Green Tree Financial Corp. ("petitioners") demonstrated that the district court's order compelling arbitration of respondent's underlying federal claims was not a "final decision with respect to an arbitration" under 9 U.S.C. § 16(a)(3). Brief of Petitioners ("Pet. Br.") 19-30. Petitioners showed that the language of Section 16(a)(3), the structure of Section 16, and the purpose of the Federal Arbitration Act ("FAA") all confirmed that an order compelling arbitration in an "embedded" proceeding is not a "final decision." *Id.*

Further, petitioners explained that the arbitration agreement was enforceable under the FAA because respondent failed to satisfy her burden of showing that Congress intended to prevent private parties from agreeing to arbitrate disputes under the Truth in Lending Act ("TILA") or the Equal Credit Opportunity Act ("ECOA"). Pet. Br. 30-49. As to the issue of arbitration costs, petitioners first showed, contrary to the court of appeals' decision, that the arbitration agreement authorized the arbitrator to award respondent her costs in accordance with the requirements of TILA and ECOA. *Id.* at 36-39. Second, petitioners explained that respondent failed to satisfy her burden of proof by identifying what the costs of arbitration would be and showing precisely how such costs would be inconsistent with TILA or ECOA. *Id.* at 18, 41-42.

Finally, as to the issue of class actions, the Court need not address this issue, Pet. Br. 42-43 & n.12, but, if it did, the arbitration agreement is enforceable because respondent can effectively vindicate her substantive rights under TILA through individual arbitration. This argument is fully supported by *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991), which held that merely because Congress anticipated some litigants would seek to proceed collectively does not mean that Congress sought to prohibit all agreements to arbitrate such claims individually. Pet. Br. 43-44. Moreover, Congress created incentives in TILA – actual damages, plus

statutory damages, costs, and a reasonable attorney's fee – that ensure that *individual* litigants could and would continue to prosecute meritorious claims under TILA. *Id.* at 46-48.

Respondent's brief ("Resp. Br.") calls none of these conclusions into question. Instead, her arguments proceed from a fundamental distrust of arbitration that is out of step with Congress' emphatic policy, recognized by this Court, in favor of arbitral dispute resolution.

ARGUMENT

I. AN ORDER COMPELLING ARBITRATION AND DISMISSING AN "EMBEDDED" PROCEEDING IS NOT A "FINAL DECISION" UNDER 9 U.S.C. SECTION 16(a)(3).

Respondent argues (Resp. Br. 9-28) that the district court's order compelling arbitration of her embedded lawsuit is a "final decision" under Section 16(a)(3). Her contentions are without merit and should be rejected.

1. Respondent agrees that Congress intended that the term "final decision" in Section 16(a)(3) should "'be construed in accordance with pre-existing . . . interpretations,'" Resp. Br. 9 (omission in original) (quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 632 (1998)), and that, under those prior interpretations, an "action qualifies as [a] 'final decision' when it 'ends litigation on the merits and leaves nothing for the court to do but execute the judgment,'" *id.* at 9-10 (quoting *Catlin* v. *United States*, 324 U.S. 229, 233 (1945)). These concessions foreclose respondent's argument here because an order compelling arbitration in an embedded proceeding does not "'end[] litigation on the merits'" given that "an 'arbitration cannot produce an enforceable result without further judicial action.'" *Id.* at 22 n.13 (quoting *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 297 F.2d 80, 86 (2d Cir. 1961)). As respondent recognizes, under the FAA, even after a court has compelled arbitration in an embedded proceeding, further judicial action will be necessary to "make[] what is already a final arbitration award a judgment of the court." *Id.* at 23 (internal quotation marks omitted).

Despite these settled principles, respondent argues that the district court's order in this case is final because "[t]here is no material difference . . . between appeals from orders compelling arbitration in independent proceedings and the appeal at issue here" in that, in both cases, "the rulings [are] issued in deference to arbitration and they dispose[] of the entire matter before the court." Resp. Br. 19. But that argument is clearly wrong. In an independent proceeding, which seeks only to compel arbitration, an order that compels arbitration is a "final decision" because it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin*, 324 U.S. at 233. In contrast, in an embedded proceeding, which seeks relief on the merits apart from the issue of arbitrability, an order that compels arbitration does not "dispose of the entire matter before the Court" because further judicial involvement after the arbitration will be "necessary for [the arbitration] award to become enforceable." *Pererra* v. *Siegel Trading Co.*, 951 F.2d 780, 784 (2d Cir. 1992); see also 9 U.S.C. §§ 9, 10, 11.

Respondent acknowledges that further judicial action will be necessary, Resp. Br. 23, but she argues that such action does not affect finality because "confirmation of an arbitration award is simply akin to the execution of a judgment in a judicial forum." *Id.* Respondent is mistaken. The FAA provides detailed substantive standards governing post-arbitration review of arbitration awards. See 9 U.S.C. §§ 9, 10, 11. As this Court noted just last Term, during post-award review of an arbitration award, the district court is authorized "'to confirm the award or to set it aside for irregularity, fraud, *ultra vires* or other defect.'" *Cortez Byrd Chips, Inc.* v. *Bill Harbert Constr. Co.*, 120 S. Ct. 1331, 1338 (2000) (quoting *Marine Transit Corp.* v. *Dreyfus*, 284 U.S. 263, 275-76 (1932)). It is only *after* an arbitration award has been confirmed by a district court pursuant to Section 9 of the FAA, that the award "may be enforced as if it had been rendered in an action in the court." 9 U.S.C. § 13. Indeed, respondent acknowledges that confirmation under the FAA, unlike exe-

cution of a judgment, provides "an opportunity to obtain modification of an award." Resp. Br. 35 n.19.[1]

Nor does respondent call into question that the "embedded-independent framework" was, and remains, well established among the federal courts of appeals as the means for determining whether an arbitration order constituted a "final decision." See, *e.g.*, *Farr & Co.* v. *CIA. Intercontinental De Navegacion de Cuba, S.A.*, 243 F.2d 342, 345 (2d Cir. 1957); *Hartford Fin. Sys. Inc.* v. *Florida Software Servs., Inc.*, 712 F.2d 724, 728 (1st Cir. 1983) (Breyer, J.); *Rogers* v. *Schering Corp.*, 262 F.2d 180, 182 (3d Cir. 1959); see also Pet. Br. 24 n.6 (citing post-1988 cases). Although respondent argues that some courts of appeals differed regarding how to characterize "Section 4 motions to compel arbitration, which were brought in conjunction with Section 3 motions to stay litigation," Resp. Br. 14, she notes that where such proceedings were deemed "independent," they were "therefore appealable," and where they were deemed "embedded," they were "therefore unappealable," *id.* at 14 (citing *Hartford Fin. Sys.*, 712 F.2d at 728-29).[2] Here, the district court's order compelling arbitra-

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[1] Although respondent does not dispute that "arbitration cannot produce an enforceable result without further judicial action," *Lummus*, 297 F.2d at 86, she argues that *Lummus* should be ignored because it "was written before Section 16 was enacted." Resp. Br. 22 n.13. But that argument fails because respondent admits that Congress, in enacting Section 16(a)(3), sought to adopt the pre-existing "definition of 'final decision.'" *Id.* at 11.

[2] The decisions from outside the Eleventh Circuit cited by respondent do not undermine that conclusion. *See* Resp. Br. 12. In *Sparling* v. *Hoffman Construction Co.*, 864 F.2d 635 (9th Cir. 1988), the Ninth Circuit did not address the question of jurisdiction. *Id.* at 637-39. In *Cedar Coal Co.* v. *United Mine Workers*, 560 F.2d 1153 (4th Cir. 1977), the Fourth Circuit ruled only that "an order dismissing a complaint with prejudice for failure to state a claim upon which relief may be granted . . . is a final appealable order under § 1291." *Id.* at 1161. Finally, the Third Circuit's 1991 decision in *Nationwide Insurance Co.* v. *Patterson*, 953 F.2d 44 (3d Cir.), could not have affected Congress' understanding of the law when it enacted Section 16 in 1988. Indeed, the *Patterson* Court confirmed that the law, as of 1988, was that "an order requiring arbitration is appealable as

tion clearly was entered in an "embedded" proceeding in which respondent sought relief under TILA and ECOA.

Next, although respondent initially agrees that courts must look to the substance of orders and "not the labels attached to the decisions," Resp. Br. 16, she later insists that the district court's label should control, regardless of substantive effect, because "stays and dismissals are governed by very different rules in Section 16 regarding their susceptibility to appeal." *Id.* at 17. Section 16(a)(3), however, draws no such distinction, and respondent never identifies how the label "dismissed," or "with prejudice," affixed by the district court in this case makes its order substantively different than the same order compelling arbitration if it were labeled a "stay." Because an order that requires "the parties to proceed to arbitration" and "stay[s] trial of the action pending filing of the award" "definitely" is "not final," *Schoenamsgruber* v. *Hamburg Am. Line*, 294 U.S. 454, 456 (1935), respondent must argue – against settled law – that appealability should turn on an "artificial[]" and "substanceless distinction between stays and dismissals." *Moses H. Cone Mem. Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 9 n.8 (1983); see also *Sullivan* v. *Finklestein*, 496 U.S. 617, 628 n.7 (1990) ("The label used by the District Court of course cannot control the order's appealability"). Indeed, respondent never addresses the anomaly that, under her interpretation, the district court would be empowered to transform unilaterally what is in substance an interlocutory order into a "final decision" through the simple expedient of the label affixed to the order, thereby circumventing the requirement in Section 16(b) that such interlocutory orders may be appealed only if the district court *and* the

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final . . . 'where it is not merely a step in the judicial enforcement of a claim . . . but is the full relief sought.'" *Id.* at 46 (quoting *Zosky* v. *Boyer*, 856 F.2d 554, 557 (3d Cir. 1988)); *see also John Hancock Mut. Life Ins. Co.* v. *Olick*, 151 F.3d 132, 135-36 (3d Cir. 1998) (arbitration order in an "embedded" proceeding "cannot be considered a final order").

court of appeals conclude that 28 U.S.C. § 1292(b)(2) has been satisfied.[3]

2. Respondent also is mistaken in claiming that the "structure" of Section 16 supports an immediate appeal of the district court's order. Resp. Br. 20-24. She argues that Section 16(a)(3) should not be given a "pro-arbitration tilt" because (i) "neither the statutory language nor the legislative history . . . indicate that appellate jurisdiction for all appeals from orders compelling arbitration should be denied," *id.* at 21, and (ii) "Congress plainly contemplated appeals under circumstances other than those addressed specifically by the [other subsections of Section 16]," *id.*

First, there can be no dispute that Section 16 reflects a pro-arbitration bias. Sections 16(a)(1) and (a)(2) authorize immediate appeals from orders, whether final or interlocutory, that are hostile to arbitration. 9 U.S.C. § 16(a)(1), (a)(2). Section 16(b), in turn, denies immediate appeals as of right from interlocutory orders that favor arbitration. 9 U.S.C. § 16(b). Respondent provides no basis for ignoring the pro-arbitration bias in Section 16(a)(1), (a)(2) and (b), when interpreting the language of (a)(3), the one remaining subsection of Section 16. Nor can she dispute that this Court "consider[s] not only the bare meaning of the word[s] but also [their] placement and purpose in the statutory scheme," *Bailey* v. *United States*, 516 U.S. 137, 145 (1995), as well as

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[3] Nor is the district court's order appealable under the "death knell" doctrine. Resp. Br. 13 n.7. Respondent's claim that "if she were compelled to proceed through arbitration alone," then "she would have to 'forego any claims she might have,'" *id.*, was unsupported both here and below, and is belied by respondent's ability to litigate and bear the costs associated with a case that has been active for more than four years in the district court, the court of appeals, and now this Court. Moreover, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978) – the decision upon which her argument rests – held that "the fact that an interlocutory order may induce a party to abandon his claim before final judgment is not a sufficient reason for considering it a 'final decision' within the meaning of § 1291." *Id.* at 477.

"'the provisions of the whole law'" including "'its object and policy.'" *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 35 (1990). These principles compel the conclusion that Congress did not intend an expansive interpretation of "final decision" in Section 16(a)(3) because it would open the door to immediate appeals of a substantial number of orders that favor arbitration and thus undermine the FAA's "'statutory policy of rapid and unobstructed enforcement of arbitration agreements.'" *Cortez Byrd Chips*, 120 S. Ct. at 1337 (quoting *Moses H. Cone*, 460 U.S. at 23). Thus, to the extent that there was any dispute among the courts regarding the meaning of "final decision" when Congress enacted Section 16, the pro-arbitration bias reflected in the structure of Section 16 supports the conclusion that Congress intended to adopt the less broad construction of "final decision" reflected in cases adopting the embedded/independent framework.

Nor does this reading "render Section 16(a)(3) superfluous." Resp. Br. 22. To the contrary, as respondent is aware, *id.* at 21 n.12, under petitioners' reading, an order compelling arbitration in an independent proceeding – a situation that is not addressed elsewhere in Section 16 – would be a "final decision" under Section 16(a)(3).

3. Finally, respondent argues that the "legislative history" may "be dispositive." Resp. Br. 25. She relies on a snippet from the congressional record which states, in a circular fashion, that a "final decision" under Section 16 includes "'a final judgment dismissing an action in deference to arbitration.'" *Id.* at 27 (quoting 134 Cong. Rec. at 31,065 (1988)). But as respondent recognizes, the legislative history also states that a decision is final "where there is nothing left to be done in the district court." *Id.* (internal quotation marks omitted). Thus, this evidence appears to do no more than reflect the embedded/independent framework. Where, as here, a court compels arbitration in an embedded proceeding, further court involvement is necessary because "arbitration cannot produce an enforceable result without further judicial action." *Lummus*, 297 F.2d at 86. Because the legislative history can be

construed as consistent with this meaning of "final decision," it should be so understood because a change in a judicial interpretation will not be presumed "without specific provision in the text of the statute." *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 371, 380 (1988).

II. THE ARBITRATION AGREEMENT IS ENFORCEABLE UNDER THE FEDERAL ARBITRATION ACT.

Respondent argues, despite the "policy favoring enforcement of . . . agreements to arbitrate," that the court of appeals "properly barred enforcement of the agreement" in this case. Resp. Br. 28. Neither her unproved arbitration costs argument nor her putative class action argument establishes that Congress intended to preclude arbitration of her claims under TILA and ECOA.

At the outset, it is important to clarify the record. Respondent repeatedly states that "the $15 value of [her] claim," Resp. Br. 45, reflects that the "economic damages" in this case "are modest," *id.* at 8; see also *id.* at 34 (speculating that costs could have "dwarf[ed] the $15 value of [respondent's] actual damages"). As petitioners explained previously, Pet. Br. 46-47, TILA and ECOA permit recovery of not only actual damages, (15 U.S.C. § 1640(a)(1); *id.* § 1691e(a)), but also statutory damages of up to $2000 under TILA, (*id.* § 1640(a)(2)(A)), punitive damages of up to $10,000 under ECOA, (*id.* § 1691e(b)), *and* "the costs of the action, together with a reasonable attorney's fee" under both TILA and ECOA (*id.* § 1640(a)(3); *id.* § 1691e(d)). It is thus inexplicable that respondent continues, misleadingly, to suggest that the value of her claimed damages is $15 when her own Complaint seeks all of these categories of relief. J.A. 26-28 (Second Amended Compl.).[4]

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[4] Respondent also suggests that she never agreed to arbitrate, claiming that she "did not have the opportunity to read carefully the installment contract." Resp. Br. 2. That claim (i) is false factually because she testified that she "could have" reviewed the agreement, J.A. 49, (ii) was aban-

A. The Arbitration Agreement Is Enforceable To Resolve Respondent's Claims Under The Truth In Lending Act And Equal Credit Opportunity Act.

Respondent makes three arguments regarding the "potential" costs associated with arbitration. First, she argues for a sweeping and unsupported change in federal law whereby an "arbitration agreement" will be held "unenforceable" unless it "ensure[s] that the costs [a plaintiff] would bear in arbitration [are] no greater than those that would be borne in court." Resp. Br. 30 (capitals altered). Second, recognizing that settled law places the burden of proof squarely on her, respondent insists that she satisfied that burden or, at worst, she "made the best record possible." *Id.* at 33. Finally, although she acknowledges that the cost and fee shifting provisions of TILA and ECOA "may apply by virtue" of the language of the arbitration agreement, *id.* at 37, respondent contends that the arbitration agreement is nevertheless unenforceable. These arguments are without merit.

1. Respondent's principal argument is that an arbitration agreement is unenforceable if it "fail[s] to ensure that the costs [a plaintiff] would bear in arbitration [are] no greater than those that would be borne in court." Resp. Br. 30 (capitals altered). That argument, if adopted, would constitute a radical change in the settled arbitration law whereby (i) every arbitration agreement covered by the FAA would be subject to challenge based on nothing more than an unsupported "concern" that arbitration might be more expensive than litigation, and (ii) the party seeking to enforce an arbitration clause would be required to allay that "concern" by proving both what arbitration costs might be and that they would not exceed litigation costs. Although respondent suggests that

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doned below, Pet. App. 22a n.3, and (iii) is frivolous because "a person who signs a contract is . . . bound thereby even if he or she fails to read the document." *Locklear Dodge City, Inc.* v. *Kimbrell*, 703 So. 2d 303, 306 (Ala. 1997) ("[t]o hold otherwise would turn the concept of 'sanctity of contract' upside down" and "would encourage irresponsibility").

this approach could be limited to "costs," which she insists "are *virtually unique* in their power to discourage parties from exercising their rights," *id.* at 31 (emphasis added), only pages later, respondent argues, apart from costs, that "absent the ability to aggregate their claims and proceed on a class wide basis," consumers also "would be unlikely" to exercise their rights under TILA in arbitration. *Id.* at 45. Respondent's *amici* complete the picture, arguing that this Court should adopt this presumption against arbitration based on their "concerns" about discovery, arbitrator competence, arbitrator bias, appellate review and virtually every other aspect of the arbitral process.[5] Taken together, respondent and her *amici*'s arguments constitute a wholesale break with settled law in favor of an approach that presumes that arbitration is suspect and imposes the burden of proof on the party seeking enforcement of the arbitration agreement.

These arguments misunderstand the purpose of the FAA and provide no basis for undoing this Court's settled precedent. As the Court has explained, Congress enacted the FAA "to ensure 'that private agreements to arbitrate are enforceable.'" *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) (quoting *Volt Info. Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). Congress understood that the procedures associated with arbitration and litigation differ, but Congress nevertheless decided that private parties should be able to choose arbitration over litigation. See 9 U.S.C. § 2. Respon-

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[5] *See, e.g.*, *Amicus Curiae* Brief of the National Association of Consumer Advocates 12 ("limits on discovery in arbitration . . . make it impossible for consumers to prove" their cases); *id.* at 19 ("any right to appeal is essentially eliminated"); *id.* at 24 (arguing that "[a]rbitrators are often biased"); Brief *Amicus Curiae* of Consumers Union 21 ("There is no way to know whether arbitrators, even if they have expertise to do so, will follow the law"); Brief *Amici Curiae* of AARP and the National Consumer Law Center 24 (arguing that "it is difficult, if not impossible, to determine whether an aggrieved party's substantive rights have been upheld").

dent, however, argues for a standard that would deny any real choice because, in her view, an arbitration agreement is unenforceable unless the party seeking enforcement could establish that the costs of arbitration (or any other procedure that could "discourage parties from exercising their rights," Resp. Br. 31) would be the *same*, or more favorable, than those associated with litigation. As this Court has explained, however, the choice between arbitration and litigation is a tradeoff based on a series of competing concerns: "[B]y agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration.'" *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).[6]

Relying on this understanding, this Court has held that the FAA manifests an "emphatic federal policy in favor of arbitral dispute resolution," *Mitsubishi*, 473 U.S. at 631, and that judicial "suspicion of arbitration," such as that advocated by respondent and her *amici*, is "far out of step with [the Court's] . . . strong endorsement of the federal statutes favoring this method of resolving disputes." *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 500 U.S. 477, 481 (1989). Indeed, respondent recognizes, but then ignores, that "[t]he federal policy favoring the enforcement of arbitration agreements is predicated on the assumption" that "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute.'" Resp. Br. 30 (quoting *Mitsubishi*, 473 U.S. at 628). As a result, the "burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Shearson/Am. Express, Inc.* v. *McMa-*

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[6] Congress did not limit enforcement, as some *amici* suggest, to arbitration agreements made "*after* a dispute arises." *E.g.*, Brief *Amicus Curiae* of Consumers Union 28. Under the FAA, agreements to arbitrate disputes, whether "existing" or "thereafter arising," both are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

hon, 482 U.S. 220, 227 (1987); see also *Gilmer*, 500 U.S. at 26. In short, respondent's principal argument is inconsistent with and provides no basis for reconsidering this Court's "strong endorsement of the federal statutes favoring [arbitration]." *Rodriguez de Quijas*, 490 U.S. at 481.

2. Settled law dictates that *respondent* bears the burden of establishing that congressional intent to preclude arbitration appears in "the text of the [federal statute], its legislative history, or an 'inherent conflict' between arbitration and the federal statute's underlying purposes." *Gilmer*, 500 U.S. at 26 (quoting *McMahon*, 482 U.S. at 227). Respondent nowhere argues that the statutory texts or legislative histories of TILA or ECOA preclude arbitration. Nor does she undermine this Court's holdings that Congress' grant of concurrent jurisdiction over an underlying statutory claim in State and federal courts "constitutes explicit authorization" for parties to agree to arbitrate such claims. See *Rodriguez de Quijas*, 490 U.S. at 482; see also *Gilmer*, 500 U.S. at 29. Instead, she appears to argue that there is an "inherent conflict" between TILA and ECOA and arbitration because the agreement "failed to protect [respondent] from the imposition of prohibitive costs." Resp. Br. 7.

On this point, respondent has failed to carry her burden. As her brief makes clear, respondent's only effort to present evidence regarding the costs associated with the Green Tree arbitration provision was an afterthought in her Motion for Reconsideration, *after* the district court had ordered arbitration. Resp. Br. 3, 33-34. In the course of a "procedural due process argument," respondent made the following "showing":

> For purposes of this discussion, *we will assume filing with the AAA*, the filing fee is $500 for claims under $10,000 and this does not include the cost of the arbitrator or administrative fees. . . . AAA further cites $700 per day as the average arbitrator's fee.

Plaintiff's Motion for Reconsideration 8-9 (J.A. 14) (emphasis added). In reply, petitioners pointed out that respondent's

assumption that the AAA would conduct the arbitration was "without support in the record." Brief of Appellees 41 (J.A. 17). After reviewing these arguments, even the court of appeals acknowledged that it lacked a record "about how claimants fare under Green Tree's arbitration clause." Pet. App. 19a.[7]

Respondent's failure of proof stands in stark contrast to the decisions upon which she relies in which the party seeking to invalidate an arbitration agreement presented a clear record of the costs associated with arbitration. Resp. Br. 31-32; see also Brief of *Amici Curiae* Trial Lawyers for Public Justice, the National Employment Lawyers Association, and the Association of Trial Lawyers of America in Support of Respondent 8-11 (noting cases where claimants established record on issue of arbitration costs). In particular, respondent's reliance on *Cole* v. *Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997), is utterly misplaced. Resp. Br. 35-36. In *Cole*, not only was the court of appeals presented with a clear record of the applicable arbitration costs and fees, 105 F.3d at 1480-81, but it *enforced* an ambiguous arbitration agreement, holding that "where a contract is unclear on a point, an interpretation that makes the contract lawful is preferred to one that renders it unlawful," *id.* at 1485.[8] Indeed, respondent conceded in her brief in opposition that the court

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[7] Respondent's failure of proof is underscored by her resort, in lieu of evidence, to a series of empty adjectives. Resp. Br. 3 ("*intolerable* risk of incurring *excessive* arbitration costs"); *id.* at 7, 28, 34, 35 ("risk" of "*prohibitive* costs"); *id.* at 29 ("risk of *high* costs"); *id.* ("*potentially large* arbitration costs"); *id.* at 30 ("failed to protect against . . . *exorbitant* arbitration costs"); *id.* at 33, 35 ("risk" of "*substantial* costs"); *id.* at 33 ("*potentially high* costs") (emphases added).

[8] The same is true under Alabama law. *Sullivan, Long & Hagerty* v. *Southern Elec. Generating Co.* 667 So. 2d 722, 725 (Ala. 1995) (explaining that contracts are construed to uphold their validity); *cf. Lackey* v. *Central Bank*, 710 So. 2d 419, 422 (Ala. 1998) (under Alabama law, the rule of *contra proferentem*, *i.e.*, ambiguity must be construed against the drafter, is "a rule of last resort that should be applied only when other rules of construction have been exhausted").

of appeals' decision in this case created a circuit conflict with the *Cole* decision. Opp. 14 & n.8.

Aware that she has failed to provide any evidence of arbitration costs under the arbitration agreement, respondent argues that (i) she "was unable to present additional evidence of the actual costs of arbitration" because "Green Tree apparently entrusted broad discretion to its arbitrators," Resp. Br. 34, and (ii) she should not be "expected to commence the arbitration . . . to ask the arbitrator assigned . . . about the costs of arbitration," *id.* at 35. These arguments are wrong. Under the arbitration agreement, the choice of arbitrator is a joint decision shared by Green Tree and respondent. Pet. App. 57a. Nothing prohibited respondent from asking an arbitrator proposed by Green Tree "about the costs of arbitration." Resp. Br. 35. Nor was she prevented from conducting discovery to determine the scope of arbitration costs. Despite having ample opportunity to do so, respondent failed to sustain her burden by presenting any relevant evidence of arbitration costs under the arbitration agreement in this case.[9]

3. Finally, even if respondent had presented evidence regarding the costs associated with arbitration under her agreement, that would not have established an "inherent conflict" between arbitration and TILA and ECOA's underlying purposes. See *Gilmer*, 500 U.S. at 26. TILA and ECOA do not insulate a plaintiff from litigation costs in federal or in State court. For example, since this lawsuit was filed more than 4½ years ago, J.A. 1, petitioners and respondent have been required to bear the costs of litigation associated with discovery and motions practice before the district court, J.A. 1-16, multiple rounds of briefing and an oral argument before the court of appeals, J.A. 17-19, and two sets of briefing before this Court. Yet there is no plausible argument that the magnitude

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[9] Contrary to respondent's suggestion, the court of appeals never "construed Green Tree's silence in its arbitration agreement as an unwillingness to bear such costs." Resp. Br. 35 (citing Pet. App. 17a-18a). Respondent has never asked whether, or under what circumstances, petitioners might be willing to pay her share of arbitration costs.

of this litigation burden creates an "inherent conflict" with TILA or ECOA. Instead, in TILA and ECOA, Congress addressed concerns about costs by ensuring that a prevailing plaintiff will recover "the costs of the action, together with a reasonable attorney's fee." 15 U.S.C. § 1640(a)(3); *id.* § 1691e(d).

Although respondent recognizes that, under the agreement, the arbitrator "may apply" the fee shifting provisions of TILA and ECOA, Resp. Br. 37, she erroneously maintains that this is inadequate, *id.* at 37-39. In this regard, her concern that the arbitrator may "not follow the fee-shifting provisions of TILA and ECOA," *id.* at 37 n.21, is answered by this Court's decisions which hold that "there is no reason to assume at the outset that arbitrators will not follow the law." *McMahon*, 482 U.S. at 232; see also *Gilmer*, 500 U.S. at 30; *Mitsubishi*, 473 U.S. at 636-37. But even if the arbitrator were to disregard the law, review under the FAA is "sufficient to ensure that arbitrators comply with the requirements of the statute." *McMahon*, 482 U.S. at 232; see also *Gilmer*, 500 U.S. at 32 n.4; *Mitsubishi*, 473 U.S. at 636-37 & n.19.

Similarly misguided is her suggestion that recovery of costs under TILA and ECOA would not include "the cost of an arbitrator's time or the additional expenses of arbitration." Resp. Br. 38. First, if, as respondent claims, recovery of these costs is essential to vindication of her federal rights under TILA and ECOA, then plainly the arbitration agreement, which grants the arbitrator "all powers provided by the law and Contract" and "all legal and equitable remedies," in conjunction with the statutory mandates of TILA and ECOA, would authorize an arbitrator to award respondent these arbitration costs. As this Court has explained, "[w]here the parties have agreed that the arbitral body is to decide" a claim "arising from the application of [federal law]," the arbitral body "should be bound to decide that dispute in accord with the [federal] law giving rise to the claim." *Mitsubishi*, 473 U.S. at 636-37.

Respondent's claim that *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), suggests a different result is baseless. There, the Court held that "absent explicit statutory or contractual authorization" a party seeking recovery of "the expenses of a litigant's witness" based solely on Federal Rule of Civil Procedure 54(d) was "bound by the limitations set out in 28 U.S.C. § 1821 and § 1920." *Id.* at 445. Here, TILA and ECOA explicitly provide that a prevailing plaintiff shall recover "the costs of the action" as part of an award of damages, 15 U.S.C. § 1640(a)(3); *id.* § 1691e(d), and the agreement provides the arbitrator with express authority to award "all legal and equitable remedies" in connection with "all disputes arising under case law, statutory law, and all other laws." Pet. App. 57a. Thus, unlike the district court in *Crawford*, where the only authority to award "costs" was Rule 54(d), an arbitrator resolving respondent's claims would have ample authority under TILA, ECOA and the arbitration agreement to award respondent her arbitration costs if she prevailed.[10]

Finally, respondent complains that "even if the costs of arbitration were covered by the fee shifting provisions of TILA and ECOA, such costs would only be recoverable in the event that [she] prevailed on her statutory claims." Resp. Br. 38. To the extent that respondent contends that she should recover her costs whether or not she prevails, neither TILA nor ECOA supports this view. Cf. 15 U.S.C. § 1640(a); *id.* § 1691e(d). Congress plainly did not seek to provide incentives for non-meritorious claims. And, to the extent respondent contends her rights under TILA and ECOA would be hindered because the costs of arbitration would be "substantially greater than those borne in a judicial forum," Resp. Br.

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[10] Respondent acknowledges that she could seek modification of an award if the costs assessed were insufficient, Resp. Br. 35 n.19, but speculates that such review does not provide "adequate protection," *id.* Although such review "necessarily is limited," this Court has made clear that it "is sufficient to ensure that arbitrators comply with the requirements of the statute." *Gilmer*, 500 U.S. at 32 n.4; *McMahon*, 482 U.S. at 232.

28; *id.* at 38, she has failed to present evidence regarding the costs of arbitration *or* the costs of litigation.[11]

Nor can respondent blandly assume that litigation costs would be lower. The delay and high costs of litigation are prime reasons that Congress enacted the FAA. See S. Rep. No. 68-536, at 3 (1924) (the FAA, by avoiding "the delay and expense of litigation," will appeal "to big business and little businesses, . . . corporate interests [and] . . . individuals"); H.R. Rep. No. 97-542, at 13 (1982), *reprinted in* 1982 U.S.C.C.A.N. 765, 777 ("The advantages of arbitration are many: it is usually cheaper and faster than litigation"). Indeed, this Court recently explained that "Congress, when enacting [the FAA] had the needs of consumers, as well as others, in mind" because "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation." *Allied-Bruce Terminix, Inc.* v. *Dobson*, 513 U.S. 265, 280 (1995).[12]

B. Congress Did Not Intend To Preclude Individual Agreements To Arbitrate Truth In Lending Act Claims.

If the Court addresses respondent's claim regarding her inability to proceed collectively in arbitration, that claim should be rejected based on settled precedent.

1. *Gilmer*, 500 U.S. at 32, is controlling. In *Gilmer*, this Court considered and rejected the argument that "arbitration procedures cannot adequately further the purposes of the ADEA [Age Discrimination in Employment Act] because

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[11] Because respondent's alleged damages far exceed the $3,000 jurisdictional limit for small claims court in Alabama, Ala. Code § 12-12-31(a), she simply could not "have prosecuted her claim in the small claims court" for a "filing fee" of "$57," Resp. Br. 33 n.18.

[12] Thus, contrary to the suggestion of respondent's *amici* (*see* Brief *Amicus Curiae* of Consumers Union 8-19; Brief *Amicus Curiae* of Public Citizen 5-18), there is no basis in the text or legislative history of the FAA to create a "consumer" exception to the federal policy in favor of arbitration.

they do not provide for . . . class actions." *Id.* The Court did not, as respondent suggests, rely on the fact that "*Gilmer* involved only an individual action." Resp. Br. 46. Indeed, the respondent in *Gilmer* made precisely that point, arguing that that "unavailability of a class action has no bearing on whether arbitration is sufficient" because "Petitioner's claim [is] an individual one." See Brief on the Merits of Respondent at 21-22, *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (No. 90-18). The Court did not adopt that argument, but instead held that "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a class action does not mean that individual attempts at conciliation were intended to be barred." *Gilmer*, 500 U.S. at 32 (internal quotation marks omitted). Because there is no reason to treat claims under TILA differently than claims under the ADEA, *Gilmer* provides a complete answer to respondent's argument.

2. Nor are class action procedures essential for respondent effectively to vindicate her rights under TILA. To argue otherwise, respondent mischaracterizes her claim as limited to the recovery of $15 in "economic damages," Resp. Br. 45, and contends that "[g]iven the limited economic damages at issue individually," a class action is "the only viable means of prosecuting" the claims of respondent and members of the putative class. *Id.* That argument ignores that Congress provided remedial incentives to ensure that plaintiffs could and would bring individual suits under TILA. Thus, if respondent prevails, TILA provides that she shall recover "any actual damage," statutory damages of up to $2000, *and* "the costs of the action, together with a reasonable attorney's fee." 15 U.S.C. § 1640(a).[13] Given these incentives, respondent sim-

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[13] That these structural incentives make individual TILA actions economically viable is clear because "TILA cases brought by individuals" have made their way to this Court. Resp. Br. 42 n.25; Pet. Br. 47 n.13 (citing cases). Indeed, the principal case respondent cites to argue that "Congress expected consumers to enforce TILA as 'private attorneys gen-

ply cannot demonstrate that she (or any of the members in her *putative* class) could not effectively vindicate statutory TILA rights through individual arbitration. And, "'[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.'" *Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi*, 473 U.S. at 637).

3. Finally, respondent contends that the legislative history of TILA reflects that "Congress believed that the availability of class action liability was critical to securing compliance with the TILA." Resp. Br. 43. As petitioners demonstrated previously, the legislative history does not support the conclusion that Congress intended class actions to provide the sole means for securing compliance with TILA. Pet. Br. 48 n.16. Indeed, respondent does not address the statements in the legislative history that make clear that Congress envisioned that "consumers" would continue to "bring individual or class actions against creditors" and that the amendments did not "preven[t] a series of individual civil actions." S. Rep. No. 93-278, at 15, 16 (1973). Moreover, her claim that class actions are essential to ensure compliance with TILA, Resp. Br. 43, ignores not only the incentives for litigation by individuals, but also that TILA authorizes governmental agencies to bring enforcement actions to ensure compliance with TILA and to obtain class-wide relief for aggrieved consumers. Cf. *Gilmer*, 500 U.S. at 32 (rejecting claim that class actions were essential because "arbitration agreements will not preclude the [federal agency] from bringing actions seeking class-wide relief"); Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioners 19-29 (noting enforcement efforts of governmental agencies). Indeed, no State or federal agency is participating in this case to argue that enforcement of TILA

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eral,'" Resp. Br. 41 (quoting *McGowan* v. *King, Inc.*, 569 F.2d 845, 848 (5th Cir. 1978)), was an individual action in which the plaintiff recovered $218.02 in statutory damages, plus "the costs of the action and a reasonable attorney's fee." *Id.* at 850.

requires that all prospective TILA plaintiffs be denied the right to choose to arbitrate their claims through individual arbitration.

In sum, respondent cannot remotely satisfy her heavy burden to show that there is an "inherent conflict" between the arbitration process and TILA and ECOA that would justify rendering her private agreement to arbitrate unenforceable.[14]

CONCLUSION

For these reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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[14] Finally, respondent's claims that she did not "waive her right to bring a class action by agreeing to arbitrate her claims," Resp. Br. 45 n.30, and that courts may "permit[] class actions to proceed to arbitration," *id.* at 48, are not properly before the Court. Respondent waived these issues by arguing to the court of appeals that "Green Tree's form contract does not provide for consolidation of complaints" and that "the right to a class action . . . cannot be duplicated in arbitration." Brief for Appellant 15, 24 (J.A. 17) (capitals altered).